PRACTICE

TRIAL PRACTICE — IMPROPER ARGUMENT OF COUNSEL PROMPTED BY IMPROPRIETY OF OPPOSING COUNSEL.

On the *voir dire* examination of a juror, in a wrongful death action, it was revealed that the defendant carried automobile liability insurance.[1] Counsel for the plaintiff, taking advantage of this revelation, made frequent references throughout the rest of the *voir dire* to the fact that opposing counsel was representing an insurance company. No objection to this was made, but counsel for the defendant, in his opening statement made use of another important discovery brought out during the questioning of the jurors—namely, that ten of those finally selected carried liability insurance. With this in mind, one of his arguments was to the effect that if too many plaintiffs won cases because the defendants were insured, the rates of the policies would increase. This was promptly objected to, but the presiding judge merely told the defendant's lawyer to cease speaking along this line, and instructed the jury that arguments were not to be considered as evidence. On appeal it was held that the opening statement contained no prejudicial error. The court said that taken by itself, it was undoubtedly improper,[2] but since it was provoked by the references to insurance made by the plaintiff's counsel, the statement was not such that it would have influenced the jury.

While this holding is in accord with many other Ohio decisions on the subject,[3] as well as the weight of authority in the United States,[4] a further analysis of leading Ohio cases is necessary for a fuller understanding of the rule. Some Ohio courts of review have looked no further after finding that the improper argument of one attorney was directly traceable to statements or argument of opposing counsel.[5]

[1] Bruno v. Petrecca, 65 Ohio App. 257, 18 Ohio Op. 430 (1940).

[2] For a complete discussion of what constitutes improper argument of counsel see 39 OHIO JUR. 694-724; 64 C.J. 250-296.

[3] Presti v. Cleve. Ry., 26 Ohio App. 536, 160 N.E. 508 (1928); Ross v. State, 22 Ohio App. 304, 153 N.E. 865 (1926); Lake Shore Electric Co. v. Ordway, 24 Ohio App. 317, 156 N.E. 235, 40 Ohio L. Abs. 763 (1926); Sperry v. Allen, 151 Ohio C.C. (N.S.) 225, 24 Ohio C.D. 302 (1911); Cleveland Worsted Mills v. Coates, 26 Ohio C.C. (N.S.) 353, 30 Ohio C.D. 610 (1916); Palmer v. Peak, 104 Ohio St. 603, 136 N.E. 884 (1922); Metzler v. Youngstown, 23 Ohio L. Abs. 586 (1936); Highway Constr. Co. v. Eber, 7 Ohio L. Abs. 58 (1922); Champney v. Braun, 23 Ohio C.C. (N.S.) 533, 34 Ohio C.D. 363 (1912); Dorger v. State, 40 Ohio App. 415, 179 N.E. 143 (1931); St. Bernard v. Goham, 10 Ohio App. 402, 411, 31 Ohio C.A. 273 (1919).

[4] L.R.A. 1918D, 107; GOLDSTEIN, TRIAL TECHNIQUE, p. 642; 64 C.J. 281.

[5] Highway Constr. Co. v. Eber, 7 Ohio L. Abs. 58 (1922); Lake Shore Electric Co. v. Ordway, 24 Ohio App. 317, 156 N.E. 235, 40 Ohio L. Abs. 763 (1926); Presti v. Cleveland Ry., 26 Ohio App. 536, 160 N.E. 508 (1928); Sperry v. Allen, 15 Ohio C.C. (N.S.) 225, 24 Ohio C.D. 302 (1911).

Apparently, basing their decisions on an estoppel theory, these courts would not allow the counsel whose censurable actions were responsible for the impropriety to complain of it on appeal, since he himself began the improper line of argument. One such court,[6] when the record was in doubt, went so far as to assume that an argument had been in answer to some improper matter introduced by the other side. This tribunal reasoned that if the trial judge, who has wide discretionary powers, did not order the argument stricken, it must have been induced by the opposing counsel. Directly *contra* to the above case is *Cincinnati Gas & Electric Co.* v. *Coffelder*.[7] The court there held that it would not attempt to apportion the blame for improper remarks made by both attorneys. The trial court, according to this decision, had a non-discretionary duty to stop the offender, and admonish the jury to disregard what had been said. While this case stands alone in Ohio in regard to improper arguments based on prior impropriety invited by an opponent, there are cases which might have been decided differently had not the jury been properly instructed after the unwarranted statement.[8]

Most Ohio decisions have been based on the idea that the improper statement was not prejudicial.[9] The reasoning seems to have been that coupled together the two improprieties neutralized each other, and neither one unduly influenced the jury.[10] One judge said that when there were indecorous remarks made by both sides the jury simply looked through the statements and viewed them "as interesting but not especially convincing."[11]

Argument reprehensible because it contained facts not in the evidence was justified in *Ross* v. *State*[12] by the fact that opposing counsel

[6] Lake Shore Electric Co. v. Ordway, 24 Ohio App. 317, 156 N.E. 235, 40 Ohio L. Abs. 763 (1926). In Champney v. Braun, 23 Ohio C.C. (N.S.) 533, 34 Ohio C.D. 363 (1912), the court reasoned in much the same way. It also gave weight to the liberality given counsel in his argument. As dictum the court in St. Bernard v. Gohman, 10 Ohio App. 402, 31 Ohio C.A. 273 (1919), said that the trial court was better able to determine whether the argument was justified by anything said by the opposite side.

[7] 11 Ohio C.C. (N.S.) 289, 31 Ohio C.C. 26, aff'd, without opinion, 83 Ohio St. 511, 94 N.E. 1104 (1911).

[8] Bruno v. Petrecca, 65 Ohio App. 257, 18 Ohio Op. 430 (1940); Dorger v. State 40 Ohio App. 415, 179 N.E. 143 (1931).

[9] Metzler v. Youngstown, 23 Ohio L. Abs. 586 (1936) ;Bruno v. Petrecca, 65 Ohio App. 257, 18 Ohio Op. 430 (1940); Wynne v. Cincinnati Traction Co., 18 Ohio N.P. (N.S.) 409, 26 Ohio Dec. 389 (1914); Palmer v. Peak, 104 Ohio St. 603, 136 N.E. 884 (1922).

[10] Dorger v. State, 40 Ohio App. 415, 179 N.E. 143 (1931). Here, both counsel used highly improper argument by trying to arouse in the jury sympathy for the children of the parties and interested persons.

[11] Cleveland Worsted Mills v. Coates, 26 Ohio C.C. (N.S.) 353, 30 Ohio C.D. 610 (1916). An earlier case had said, however, that when there was wrangling back and forth between the two attorneys, the jury could not get an unbiased view of the facts, and a new trial was necessary. Columbus Ry. v. Conner, 6 Ohio C.C. (N.S.) 361, 17 Ohio C.D. 229 (1905).

[12] 22 Ohio App. 304, 153 N.E. 865 (1926).

made challenging statements which could not be adequately answered in any other way.

The Ohio courts have never required that an attorney object to impropriety in order that he may retaliate by improper argument. Likewise good faith on the part of the answering attorney has not been necessary. As long as the argument complained of was reasonable, in direct relation to, and concerning improper remarks introduced by the opponent, it has been allowed.[13]

The courts have left unanswered the question of whether counsel has an absolute right to answer in an improper manner the abusive remarks of his opponent.[14] While there is no authority on the subject this matter would probably be left to the discretion of the trial court.

It is difficult to say whether or not this rule concerning improper argument in reply to improper remarks is a good one or not. It offers to the counsel a chance to counter-balance the effect of censurable statements to which he did not object, and which, therefore, he could not assign as error on an appeal. At the same time, however, the practice gives an attorney, who is not acting in good faith, a chance to sit back after reprehensible discussion by his adversary, and wait—then when the time is ripe he may reply, using improper and indecorous language which he hopes may influence the jury in favor of his client.

R. C.

[13] Exceptions are Cincinnati Gas and Electric Co. v. Coffelder, *supra*, note 6; and Columbus Railway v. Conner, 6 Ohio C.C. (N.S.) 361, 17 Ohio C.D. 229 (1905).

[14] If the argument complained of cannot be correlated with, and is not in direct relation to the improper argument of complainant, it will be held to be reversible error if prejudicial. Kokomo Steel and Wire Co. v. Ramseyer, 190 Ind. 192, 128 N.E. 844 (1920); Green v. Laclair, 91 Vt. 23, 99 Atl. 244 (1916).